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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1928.

No. 9

HUGH W. GRANT, Receiver of the Struthers Furnace Company, Petitioner,

vs.

A. B. LEACH & COMPANY, INC.

REPLY TO BRIEF AND SUPPLEMENTAL BRIEF OF A. B. LEACH & COMPANY, INC.

J. P. WILSON,
Counsel for Petitioner.

A. M. HENDERSON,
Of Counsel for Petitioner.

(33,788)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1928.

No. 479

HUGH W. GRANT, RECEIVER OF THE STRUTHERS FURNACE COMPANY, PETITIONER,

vs.

A. B. LEACH & COMPANY, INC.

REPLY TO BRIEF AND SUPPLEMENTAL BRIEF OF A. B. LEACH & COMPANY, INC.

MAY IT PLEASE THE COURT:

We shall confine this reply brief to the precise points discussed in the appellant's brief and supplemental brief. We shall not reply twice to the same argument urged by respondent in its brief and reiterated in a supplemental brief. We shall try to avoid reargument of the matters covered by our brief, except in so far as it is necessary to do so to preserve the continuity of this reply.

I.

The Federal District Court for the Northern District of Ohio, Eastern Division, is not a foreign court in the sense that a receiver appointed by a State Court in Ohio cannot sue therein.

All of the cases cited by the appellant in its brief are cases where a Receiver, appointed by a State Court, not being vested with title, has sought to sustain his action in a Federal Court located in a foreign state. We concede the rule to be that in such cases the State Receiver may not maintain his action therein. No cases cited in either of respondent's briefs sustain his position on this question. It is true that the State Court and the Federal Court derive their power from different sources, but we do not believe that heretofore it has ever been urged, certainly never decided, that the Federal Court for the Northern District of Ohio was foreign to the State Courts of Ohio. This Federal Court administers the law as determined by the courts of our state; its practice and procedure in the main are the same; its jurisdiction in many cases is concurrent with that of the State Court; it draws its juries in part from Mahoning County, Ohio, which lies within this district and Division of the district; cases are removable under the statute from the Common Pleas Courts of the District to the Federal Court under the Federal Statutes; it sits twice a year, holding two sessions in Mahoning County, Ohio, and its judges are residents of the district, two of them having been appointed from Mahoning County.

So far as the Federal Courts have laid down the rule of exclusion, the up-shot of the decisions seems to be this: "A Receiver appointed by a State Court cannot sue in a Federal jurisdiction other than that in which the Receiver was appointed."

Stroutt vs. U. S. Shoe Manufacturing Co., 195 Fed. 313 (4th part of syl. and opinion page 319).

Hale vs. Allison, 188 U. S. 56 (Second Section of 4th syllabus).

State Courts have decided that Receivers in Federal District Courts might sue in the courts of that district and state, they not being foreign courts.

Tardy on Receivers (Sec. Ed.), Section 700.

State vs. U. S. Fidelity and Guarantee Company, 81 W. Va. 184.

DeLano vs. Malcolmson-Houghton, 183 Mich. 62.

In a race between Receivers for the custody of property, the Supreme Court of the United States upheld the right of the Receiver appointed by a State Court to sue in the Federal Court of that district and to oust a Receiver appointed in an action of the same nature in that court.

Shields vs. Coleman, 157 U. S. 168.

In the recent case of

Harkins vs. Brundage, 275 U. S. at page 36,

a Receiver appointed in the Superior Court of Cook County, Illinois, successfully litigated in the U. S. District Court of that district against a Federal Receiver

appointed by that court for the possession of property then in the hands of the Federal Receiver.

It would be an endless task to cite the cases where State Receivers have brought actions in Federal Courts of that district in which to our knowledge no such question has been thought to be of sufficient merit to be raised. We think the Federal District Court for the Northern District of Ohio was the proper forum in which to prosecute this action.

II.

The appellee is not precluded from urging in this Court that under the pleadings in this case it has been admitted that this receiver is suing by virtue of authority conferred upon him by the court of his appointment to bring this action.

On page 19 of our brief, it is argued that under Rule 30 an averment of the original petition (Record, page 2) that "this action is brought by the Receiver by virtue of authority so to do granted to him by the court so appointing him as Receiver," was not denied by the answer. Neither was it denied by the amended answer of the defendant. Furthermore, that it was expressly alleged in those answers that the defendant "did not deny" that allegation.

The order of the court directing the Receiver to sue and the original petitions upon which the Receiver was appointed were not introduced in evidence in the District Court. The Circuit Court of Appeals took a different view of the matter and intimated to counsel

(see page 32 of the record) that a "decision upon the authority of the Receiver to sue, if it were based merely upon the absence from the record of the proceedings of the Common Pleas Court bearing upon such authority, would not be effective as a final decision upon that point and that the Court would therefore be inclined to remand the record to correct this omission in the proofs." Thereupon by consent of counsel of appellant and appellee the record was supplemented by the documents contained in supplement to transcript of record setting forth the original mortgage foreclosure petition, the petition of Baldwin and the journal entry appointing the Receiver, and the application to sue and the order to sue.

It is now claimed by appellant that, by voluntarily introducing further proof upon a point which the Circuit Court of Appeals held was in issue between the parties, but which we insisted was not at issue, because our averment had not been denied, we are, therefore, precluded from insisting at this time that the court was in error in holding that any proof at all was necessary.

The cases cited by respondent on page 9 of the supplemental brief do not seem to be germane to or authoritative upon this proposition. Does the question amount to any more than this? If in the trial of a law suit, a court erroneously holds that the burden of proof is upon the plaintiff upon a certain proposition, and the plaintiff thereupon goes forward to introduce such proof, does he waive the right thereby to predicate error upon the ruling of the court on that proposition

or may he still insist in error proceedings that no proof was necessary to be introduced by him, the averment which he introduces proof to sustain not having been put in issue? Such a rule would render nugatory the principle that it is only the questions of fact put in issue by pleadings that need be litigated, and that to shift the burden to the plaintiff of proving facts which the defendant had expressly stated he did not deny, would not make the probative effect of those facts an issue in the case.

This argument is made, of course, merely preliminary to our earnest insistence that if the court should hold otherwise on this question of pleading, the supplemental record introduced by consent shows ample authority in the court and in the Receiver to sustain this action.

DISTINGUISHING CASES CITED BY A. B. LEACH & COMPANY ON THIS CONTENTION ON PAGE 9 OF THE SUPPLEMENTAL BRIEF.

The cases cited by respondent, as we have before stated, do not appear to be authoritative at all in support of their contention. These cases are cited on page 9 of their supplemental brief. In the cases of *Jones Company vs. Munger Improved Cotton Mach. Mfg. Co.*, 50 Fed. 785, the court will note that there was an express request upon the part of the appellee that the cause be heard upon its merits and a disavowal on the part of the appellee of any desire on its part to take advantage of any irregularities which might have occurred in bringing the case up, or of any omission on

the part of the appellant to assign errors; we find in that case an express wish addressed to the court on the part of the appellee to wipe the slate clean of any irregularities or defects that might have occurred prior to the hearing in the lower court, and to confine the hearing in the reviewing court to a hearing on the merits.

In *Bloomfield R. Co. vs. Grace,* 112 Ind. 128 and 13 N. E. 680, on page 681 of the opinion in the N. E. Rpr., it will be seen that there was an express stipulation in the lower court between the parties that the matter to be determined by the reviewing court should be confined to one question only, and that question pertaining to the correctness of the lower court's ruling on the demurrer to the answer.

In *Riggs vs. Commercial Mutual Insurance Co.,* 125 N. Y. 7, 10 L. R. A. 684, on page 685 of the L. R. A. Report, it will be seen that there was an express stipulation by the plaintiff that he would waive his right to appeal to the reviewing court from the order of reversal in consideration of the defendant's consent that if a certain judgment should be affirmed, there should be a reargument in the case on the sole question of plaintiff's insurable interest, which consent was given.

The court rightfully held, we think, in all three of these cases, that the stipulating parties were bound by the express terms they had set out in their stipulations. In the instant case there is an entirely different situation. It has been the contention of your petitioner at all times that the burden was not upon the Receiver to prove authority in him to bring this suit

by reason of the fact that the answer and amended answer of respondent admitted this authority. Your petitioner has never at any time abandoned this contention. However, the Circuit Court intimated that unless the record were supplemented they would probably remand the case back to the District Court in order to require the admission of evidence. This, we think, was erroneous, but in order to facilitate matters, the stipulation relied upon by respondent was signed and the exhibits mentioned therein were introduced. Certainly this situation is plainly distinguishable from the cases cited by respondent.

III.

The Circuit Court of Appeals apparently overlooked the unbroken line of authorities of the Federal court in Ohio recognizing the powers of Ohio receivers as determined by the Supreme Court of Ohio.

We refer to pages 26, 27, 28, 29 and 30 of our brief to uphold our contention that the Supreme Court of Ohio has held that

> "Receivers appointed under Section 11894 of the General Code, or any sub-section thereof, have powers and title equivalent to the powers of assignees for the benefit of creditors and the same powers and authority as would be vested in the Receiver of a dissolved corporation."

Ihams vs. Saunders, 21 Fed. (Second Series), Opinion, page 252.

In re Bettman vs. Johnson, 250 Fed. 657, 12th and 13th part of syllabus and opinion, at page 667.

DuPont Powder Co. vs. Jones Bros., 200 Fed. 638, opinion of court, page 645.
Forcner vs. Citizens' Savings Co., 186 Fed. 5.
Cincinnati Equipment Co. vs. Degnan, 184 Fed. 834, Opinion, page 843.
Hamilton vs. Beggs, 179 Fed. 949, Opinion 952.

The Receiver then, by virtue of his appointment as Receiver of this insolvent corporation, having the same powers that he would have had if he had been appointed a Receiver of a dissolved corporation or that he would have had if an assignment had been made to him for the benefit of creditors, we come to inquire what would have been his authority in those events, referring the court to

Cornell et al. vs. Sulter, 13 Ohio Circuit Decisions, 384,

quoted on page 30 of our brief, and what would have been his authority if he had been appointed a Receiver in a suit to dissolve the corporation? We refer the court to Section 11945 of the General Code quoted on page 68 of our brief.

This Receiver then having inherent power, by virtue of his appointment, to institute suits to set aside fraudulent conveyances of property theretofore made by the corporation, and representing for that purpose not the corporation itself but its creditors, stockholders, and bondholders, it is difficult to understand how the fact that this particular equitable demand asserted by the Receiver can be said not to have been included in his powers because of the mere fact that it was not de-

scribed in or covered by the mortgage nor specifically referred to in the petition of Baldwin filed upon the same day as the foreclosure suit. It is no sufficient reply to this to urge that a Receiver could not have taken possession of specific real estate not covered by the mortgage. This suit grows out of the identical bonds for which the mortgage resting upon this particular property was given to secure. It is an inquiry primarily directed to the validity of part of those bonds. It seeks the restoration of those bonds and the expunging of their lien from the proceeds of the property, praying for the restoration of those bonds. It is in effect such a case as an assignee would bring for the benefit of creditors or the Receiver of a dissolved corporation would bring, acting as its liquidating agent, to set aside a fraudulent or unlawful conveyance, or if that can not be done by reason of the protection afforded to *bona fide* holders of those bonds by purchase from Leach & Company, then in aid of the Receiver's undoubted duty to conserve the *proceeds* of the property, that the wrong-doer should account in equity to the end that so much of the proceeds as would be swept away in payment or part payment of the bonds unlawfully issued, should be restored and the proceeds to that extent be augmented by recovery against Leach & Company either for the benefit of the valid bondholders in case of a shrinkage in value of the property, or for the benefit of creditors if the property should be sufficient to pay all the bonds.

The Circuit Court of Appeals aparently proceeded upon the theory that, because no averments were made

in the foreclosure case as to the invalidity of these bonds, and therefore no issue made in that case as to their invalidity, the Receiver, under order of court, had no power nor could power be conferred upon him by the court to inquire into the validity of these bonds.

If Leach & Company had still held these bonds, is there any question that the Receiver could have defended against their foreclosure, in view of the fact that the trustee at all times knew, by reason of the fact that the trustee itself effected the physical exchange of bonds for stock, (see page 145 of the record) of the invalidity of those very bonds? If the trustee is unmindful of its duty to those admittedly holding valid bonds who are interested in the security back of their bonds, is the Receiver, by reason of the trustee's omission to raise the issue, precluded from doing so, representing as he does not only the creditors but the valid bondholders also? We believe that it was not only within the power, but it was the duty of the Receiver to institute this proceeding, and entirely within the jurisdiction of the court to so order the Receiver to proceed.

Mississippi Valley Trust Co. vs. Railway Steel Springs Co., 258 Fed. 346 (C.C.A. 8, Circ. Ct. Syl. 7. Note page 37 of our brief).

Porter vs. Sabin, 149 U. S. 473, 474 (38 Law edition 815, 4th part of syl. Note page 32 of our brief).

IV.

The court had jurisdiction of the parties and subject-matter of mortgage foreclosure case and of the Baldwin case. It had jurisdiction to consolidate the action, it had jurisdiction to appoint a receiver, and jurisdiction to order the receiver to proceed with the present action.

Passing for a moment the question of the right of Leach & Company to challenge the validity of the order of the State Court, and considering the jurisdiction of the court as shown by the record contained in the supplement to the record filed in the Circuit Court of Appeals, we find that this is a case for the foreclosure of a mortgage against a corporation which has defaulted in the payment of the interest upon its bond, from which it definitely appears that this corporation can not pay its debts in the usual course of business. An express averment of its insolvency is by no means necessary. Its inability to pay its current obligations, particularly its mortgage indebtedness, establishes its insolvency under the laws of Ohio.

Mitchell vs. Gazzam et al., 12 O. Rp. 315 and 336.

American Can Co. vs. Erie Preserving Company, 171 Fed. 540 and 542.

Cincinnati Equip. Co. vs. Degnan, 184 Fed. 834.

Pacific Northwest Packing Co. vs. Allen, 109 Fed. 515-518.

In addition to this, as we have said, it abundantly appears from the petition in the Baldwin case that the

corporation was hopelessly insolvent and very heavily indebted to past creditors, and that its tangible property was being swept away by pledgees, at greatly depreciated values, who had failed to account to the corporation.

Turning now to Section 11894 of the General Code, page 23 of the original brief, in section 2 the right is given to a mortgagee in foreclosure cases to the appointment of a Receiver "*when it appears* that the mortgaged property is in danger of being lost, removed or materially injured," *or* "that the condition of the mortgage has not been performed and the property is probably insufficient to discharge the mortgage debt." Reading this in connection with sub-division 5, page 24 of brief, also Receivers are appointed in cases provided in this title, (a mortgage foreclosure is one of the cases provided in the title), "when a corporation has been dissolved or is insolvent or in immediate danger of insolvency."

The question at once arises—how is it to be *made to appear* to the court that the corporation is insolvent or in danger thereof, or that the property is probably insufficient? It is contended in defendant's brief that those facts must be stated in the mortgage foreclosure petition. Even if that were the rule, sufficient is alleged in the mortgage foreclosure petition from which the court, under the authorities just cited, could reasonably infer insolvency. But such is not the rule. On the application for a Receiver on a mortgage foreclosure petition it is everywhere the general practice, if need be, to show either by affidavit or oral evidence the insufficiency of the property or the insolvency or

imminent insolvency of the corporation so that it shall *appear* to the court, in the language of the statute, that those facts exist, calling for the appointment of a Receiver. Time after time Receivers have been appointed in foreclosure cases on application and proper showing of the necessity therefor.

Now we have the Baldwin case filed the same day under oath of the petitioner setting up in detail the facts which constitute insolvency. These cases were consolidated and the court, exercising its jurisdiction, appointed a Receiver in the consolidated case entitled Guardian Savings & Trust Company, Trustee, *vs.* A. B. Leach & Company. If the averments in the Baldwin petition be considered to be no more than an *affidavit* of the facts, there appears from the face of the record to have been ample evidence before the court of the insolvency of this corporation, its huge indebtedness and its inability to pay its debts in the regular course of business or to redeem even its pledged stock on hand. Everything necessary to be done or to be shown to the court to authorize the appointment of this Receiver will be conclusively presumed to have been done and shown, so that it appears to the court that a Receiver was necessary. Moreover, it appears from the face of the record itself that in the mortgage foreclosure case, supplemented by the sworn verified facts in the Baldwin case, that it was abundantly made to *appear* to the court that a Receiver should be appointed both because there was a default in the mortgage and because of the insolvency of the corporation and the probable wasting of its assets. Certainly no one could take advantage of the fact that these actions were

consolidated by the court on his own motion except the parties affected by that consolidation. No question was made by the Circuit Court of Appeals as to the validity of the Receiver's appointment. See record at page 272.

Both petitions and præcipes for summons were filed January 15, 1925. The Receiver was not appointed until January 20, 1925. It will be conclusively presumed, which is in fact the truth, that summons was immediately issued which constitutes the pendency of the case under *General Code of Ohio, Section 11279*:

> "A civil action must be commenced by filing in the office of the Clerk of the proper court, a petition and cause a summons to be issued thereon."

Even though the Receiver had been appointed on the same day, it would be presumed that each was in its proper order.

Ellwood vs. National Bank, 41 Kansas 475.

A Receiver may be appointed either under a prayer for such relief in the petition or on a motion subsequently filed.

Bates New Pleading and Practice, Volume 1 (Ohio), page 722.

In *Clonne vs. Bradstreet*, 2 Handy (Ohio), opinion of the court at page 77 (affirmed 7th O. S. 323), it appeared that there had been no prayer for a Receiver in the petition itself. The court says on page 77:

> "The power to appoint a Receiver is so fully conferred by section 253 of the code (the old

> code section), that in every proper case, we think, it may be exercised without a formal petition; and whenever it shall appear on trial, or at the time the decree is entered, that the interests of the parties who have claims on the fund require its protection, a Receiver may be appointed. The 2d, 3d, 4th, and 6th clauses of the section of the code, already referred to, not only specify the particular cases in which the power may be exercised, but seem to make the duty to appoint imperative on the court, if the circumstances require it, to prevent a failure of justice."

Again it is held in

Hotenstein vs. Conrad, 9 Kans. 435

and

Commercial Savings Bank vs. Corbett, 5 Sawyer 172,

that a pleading, in which the appointment of a Receiver is sought, need not set out facts showing the necessity thereof, but need only disclose that the action is one of the claims in which such appointment is authorized. The grounds for it are left to the motion.

In *Bates New Pleading and Practice,* Volume 1 (Ohio), at 723, it is held:

> "The extent or limits of the power (of the receiver) will be defined in the order of appointment, and can be enlarged from time to time, according to the exigencies of the case."

In Ohio, a prayer for general alternative relief such as occurs in the petition of the Guardian Savings &

Trust Company *vs.* A. B. Leach & Company, (see page 15 of the supplement to transcript of record) entitles the court to grant any redress to which the party is entitled.

Bates Pleading and Practice, Volume 1, pages 36-306.

Draper vs. Moore, 2 Cincinnati (Superior Court Reports) 167 opn. of ct. page 174, citing Davenport *vs.* Sovil, 6 O. S. 462.

Brundridge vs. Goolove, 30 O. S. 374.

Riddle vs. Roll, 24 O. S. 572.

Davenport vs. Sovil, 6 O. S. 462.

V.

The attempt of Leach & Company to question the jurisdiction of the Court to order the receiver to sue and to question the authority of the receiver under that order, constitutes a purely collateral attack upon the judgment and orders of the Court of competent jurisdiction.

It is admitted by the respondent (see respondent's supplemental brief, bottom of page 21) that this is a collateral attack upon the orders in question. On page 22 of that brief a number of cases are cited to the effect that a judgment affecting individual rights of persons not parties or privies to a proceeding, where such persons were adversely affected by the judgments rendered therein, is not immune from collateral attack. The obvious reply to this line of reasoning is that this direction of the court to proceed against Leach & Company does not purport in any manner whatever to adjudge or determine or to affect in any manner any ma-

terial rights which Leach & Company has arising out of the subject matter of the intended suit. The order of the court, on page 30 of the supplement to transcript of record, simply directs the Receiver to obtain from said company (Leach & Co.) such relief as should be obtained against said company. It is an ordinary direction and authority of the court conferred upon the Receiver to test the question of the validity of the alleged invalid transaction and in no sense adjudges any matter or thing whatever against Leach & Company, and so far as that is concerned, the order of the court is immune from collateral attack.

Much criticism is made in respondent's briefs of the infirmity of the petition filed by Baldwin, in that it is claimed that no equitable relief, save the appointment of the Receiver, is prayed for in that petition.

It is true that the petition does not pray that the creditors, who have exercised their pledges and sold large amounts of tangible assets at a great sacrifice, should account in equity to the corporation, on whose behalf he sues, for the reasonable value of those assets; but it does set forth facts showing conclusively the insolvency of the corporation and the immediate need of a Receiver under the statutes.

This was a case pending in court; it was consolidated by the court with a mortgage foreclosure case; its averments were considered by the court and whether we shall say that they were considered in the light of a petition or as a mere affidavit, they did make it *appear to the court* that a Receiver should be forthwith appointed to conserve the proceeds of all of the property of the corporation, which is admittedly the scope of

the court's order. (See original record setting forth the petition, page 2, and the answer of Leach & Company, pages 9 and 19.)

Now of what avail is it to Leach & Company to urge that the petition of Baldwin was fatally defective in the respects pointed out, that it would not have withstood a demurrer, that it was error for the court to act upon that petition, or that it was grossly irregular for the court so to act upon that petition conjointly with the admittedly competent averments in the mortgage foreclosure case? If all of these defects, infirmatives and irregularities were admitted, still the court had jurisdiction to act to make its judgments and orders in the consolidated case, and no question of error in the court's procedure, even though that error was sufficient to reverse the judgments and orders, can be urged as a reason for making this collateral attack upon the court's order.

We respectfully submit that there is a wide difference between the erroneous exercise *of jurisdiction* and the lack of power to exercise any jurisdiction. In this connection we cite the case of

Jarrell vs. Cole, 215 Fed. 315, 4th Circuit,

for the reason that the judgment of the court reviews the various cases from the Supreme Court of the United States defining the extent to which Federal Courts have gone to protect judgments, decrees, and orders of court from collateral attack.

In *Jarrell vs. Cole et al., supra,* page 318 of the opinion, it is stated:

> "The courts go to great lengths in upholding judgments and decrees which are assailed in collateral proceedings for want of jurisdiction to render them. Especially is this so where, as in the case at bar the adjudicating tribunal had jurisdiction of the parties and the subject-matter. Indeed, it is little less than surprising to note the omissions and defects, the lack of material averments and other irregularities, which have been held insufficient to impeach jurisdiction."

The case of

Spoors vs. Coen, 44 O. S., 497,

relied upon by the appellant and cited in his brief, was a case where it was attempted to sell land of a decedent which had been fraudulently conveyed, by a proceeding in the *Probate Court,* which court had no jurisdiction whatever to hear or determine any such cause (see first part of syllabus of said case), the jurisdiction to do so being vested in the Court of Common Pleas. In that case, there was a total lack of jurisdiction, but as the court says in that case, on page 502, a judgment rendered by a court of competent jurisdiction in a case brought before it, however erroneously the jurisdiction may have been exercised, is one thing, and a judgment entered by a court of like jurisdiction in a case not before it is another and a different thing.

In the above case of *Spoors vs. Coen,* the Supreme Court of Ohio, opinion page 503, has stated:

"It is not necessary that the statement of the claim should be so perfect in form and substance, as to be free from objection *on demurrer*, to confer jurisdiction upon the court to hear and determine it. *Buchanan vs. Roy*, 2 Ohio St. 251 (should be page 252). If the case presented invoked the jurisdiction of the court, and could have been perfected by amendment, the judgment of the court thereon could not be treated as a nullity."

Assuming, for the sake of argument, that the petition in the Baldwin case had for its sole object the appointment of a Receiver, and that the Court acted upon the prayer of that petition in conjunction with the mortgage foreclosure case, can there be for that reason a collateral attack on the judgment or order of the court?

"The appointment of a Receiver can not be collaterally attacked on the grounds that the sole object of the suit wherein the appointment was made was the appointment of a Receiver."

See directly in point

McNary vs. Bush, 35 Oregon, 114; 56 Pac. 646 and 647;

and to the general purport

Shinny vs. North American Sav. & Loan Building Co., 97 Fed. 9.
Olmstead vs. Distilling Cattle-Feeding Co., 73 Fed. 44.

As to the wide discretionary power of courts in appointing Receivers and making orders directing their proceedings, see

Fletcher on Corporations, Vol. 8, Sec. 5234.

As to the distinction between the jurisdiction to appoint a Receiver and the exercise of that jurisdiction, see

Fletcher on Corporations, Vol. 8, Sec. 5212.

The decisions relating to collateral attack upon the judgments and orders of the court in appointing Receivers and ordering them to proceed, have been so fully argued in the light of the Ohio cases and Federal cases from pages 41 to 59 of our original certiorari brief that we deem it unnecessary to prolong this brief by reiteration of the argument and the cases therein fully set forth.

Upon the precise point that orders of court in the administration of an insolvent or other estate are as fully protected from collateral attack as the final decree, we refer the court without repetition to pages 57 and 58 of our original certiorari brief.

In conclusion, we join with the respondent in requesting, if it may be consistent with the practice in the Supreme Court, that in the event that this case be reversed, this court will retain its jurisdiction of the case to inquire into the merits of our contention upon the main subject of controversy which was not considered or decided in the Circuit Court of Appeals, allowing to the respective parties opportunity to file

such briefs as may be necessary in addition to the briefs upon the merits of the case filed in the Circuit Court of Appeals.

Respectfully submitted,

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